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Judical Abrogation of Governmental and Sovereign Immunity: A National Trend with a Pennsylvania Perspective

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JUDICIAL ABROGATION OF GOVERNMENTAL AND SOVEREIGN IMMUNITY: A NATIONAL TREND WITH A PENNSYLVANIA PERSPECTIVE

I. INTRODUCTION

On May 23, 1973, the Pennsylvania Supreme Court filed an opinion, *Ayala v. Philadelphia Board of Public Education*,[1] which abolished the doctrine of governmental immunity from tort liability in Pennsylvania. On the same day another opinion, *Brown v. Commonwealth*,[2] upheld the concept of sovereign immunity. With these two decisions the court not only demonstrated the existence of a distinction between governmental and sovereign immunity but also emphasized the trend in the United States towards enlarging the scope of governmental tort responsibility, particularly via judicial abrogation of the immunity doctrines. Accordingly, the purpose of this Comment is two-fold. The first is to outline the national movement towards greater governmental tort liability and to assess the Pennsylvania position with respect to it. The second, and larger, objective is to ultimately determine whether the stance adopted by the court in *Brown* will endure future assaults upon the concept of sovereign immunity in the commonwealth. In so doing, the doctrine of governmental and sovereign immunity will be examined from both a national and a Pennsylvania perspective. Furthermore, the obstacles encountered by courts considering the abrogation of the immunity doctrines, as well as the tactics employed to circumvent these difficulties, will be similarly approached.

Governmental immunity from tort liability is that protection afforded *local governmental units*—not the state—from responsibility for tortious conduct.[3] Apparently originating in 1788 with the English case of *Russell v. The Men of Devon*,[4] the doctrine is said to lie on six grounds:[5] 1) the fear of an infinity of actions; 2) the lack of corporate funds out of which to satisfy tort judgments; 3) the failure of local units to derive profit from the exercise of governmental functions which are solely for the public

1. 453 Pa. 584, 305 A.2d 877 (1973).
2. 453 Pa. 566, 305 A.2d 868 (1973).
3. *See* W. PROSSER, LAW OF TORTS 977-84 (4th ed. 1971).
4. 100 Eng. Rep. 359 (K.B. 1788).
5. W. PROSSER, LAW OF TORTS, *supra* note 3, at 978.

benefit; 4) the inapplicability of the doctrine of *respondeat superior* to officers performing such functions, as the officers are agents of the state and not of the local units; 5) the inability of local units to effectively administer local government should tax money be diverted to compensate tort damages; 6) the unreasonableness of holding local units liable in the performance of duties imposed upon them by the state legislature, rather than assumed voluntarily under their general power.

On the other hand, the doctrine of sovereign immunity enables the *state* to avoid liability for the tortious exercise of its activities.[6] Of even more ancient origin than its governmental counterpart—"the King can do no wrong"—sovereign immunity is said to rest on five grounds:[7] 1) the absurdity of a wrong committed by an entire people; 2) the idea that whatever the state does must be lawful; 3) the theory that an agent of the state is outside the scope of his authority when he commits a wrongful act; 4) the reluctance to divert public funds to compensate for private injuries; and 5) the inconvenience and embarrassment which would descend upon the state if it should be subject to such liabilities. Moreover, the doctrine of sovereign immunity has received substantial support from state constitutional provisions, which provide that the state may be sued in such manner, and in such courts as the legislature may by law direct.[8] In some instances, these provisions have been interpreted to mandate sovereign immunity.[9]

As the foregoing illustrates, the differences between governmental and sovereign immunity fall into three categories. The first is the subject of each immunity—governmental shields local units, sovereign the state. The second is the origin of each concept—governmental from the 1788 case of *Russell v. The Men of Devon*,[10] sovereign from the more ancient theory that "the King can do no wrong." Third is the presence of subsequent constitutional support; typically only sovereign immunity is deemed mandated by state constitutional provisions. In comparing the two immunity doctrines it is apparent that sovereign immunity has greater vitality. This will become even more evident in the following examination of the tendency towards imposing greater tort responsibility on governmental units, local and state alike.

II. Trend Towards Greater Governmental Responsibility

Although the doctrines of governmental and sovereign immunity have had apparently great vitality and wide-spread influence in the law, they are not above partial or total abrogation

6. *See id.* at 975-77.
7. *Id.* at 975.
8. *See* notes 167-205 and accompanying text *infra*.
9. *Id.*
10. 100 Eng. Rep. 359 (K.B. 1788).

to meet changed conditions of society.[11]

> And certainly one of the changes taking place today not only in the United States but also in many of the other countries of the world, is a transition from individualism to collective security—and this includes an assumption by the body politic of much of the devastation created by all manner of individual tragedies which due to accident, or disease, to an act of God, or of the State, or of man. And part and parcel of this trend is the gradual expansion of tort liability of the State.
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> . . . The expansion will not be so rapid. Fear of an "infinity of actions" in milking the public treasury gives pause to legislatures as well as courts. But other nations are doing it without bankruptcy, and so will we, give us time.[12]

The foregoing observation, which has subsequently been proved prophetic, was made in 1954, at a time when most states had not undertaken tort liability. Indeed, a comprehensive national survey completed that year categorized the states into five groups in an attempt to portray the extent to which state and local governments assumed liability in tort.[13] This study indicated that abrogation of the immunity doctrines was accomplished in only one jurisdiction, New York—and that by way of legislative enactment,[14]

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11. *See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12-13, 19-21, 29-32, 40-42, 51-52, 54-56, 58, 62-66, 71-73, 75, 98-99, 112-17, 124-26, 129, 167-69 (1921).

12. Stason, *Governmental Tort Liability Symposium*, 29 N.Y.U.L. REV. 1319-20, 1324 (1954).

13. Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1362, 1407 (1954).

(1) *Liability for Substantially All State Torts.*
. . . New York. . . .
(2) *Responsibility Undertaken in Most Cases.*
Alabama, Arkansas (the state, but not local units), Illinois, Iowa, Kentucky, Minnesota, North Carolina, Ohio, Oklahoma (based upon questionable interpretation of new statute), Rhode Island (legislative discretion), Tennessee, and West Virginia.
(3) *Occasionally Responsible*
California, Connecticut, Louisiana, Maine, Massachusetts, Michigan, . . . , Montana, Oregon, South Carolina, North Dakota, Utah, and Wisconsin.
(4) *Responsibility Seldom Undertaken*
Colorado, Delaware, Florida, Georgia, Indiana, Kansas, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Pennsylvania, Vermont, Virginia, Washington.
(5) *Responsibility Almost Never Undertaken*
Arizona, Idaho, Maryland, Mississippi, Missouri, Nevada, Texas, and Wyoming.

14. N.Y. CT. CL. ACT § 8 (1963):

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied

not judicial decision.[15] However, the study concluded that governmental and sovereign immunities were on their way out as part of the American legal system.[16] Yet the way out was described as "slow and circuitous."[17] The appealing advantage of immunity, the dislike of paying off tort liabilities, and the anarchic self-identification of citizens with the state were viewed as tending to perpetuate the doctrines.[18]

Nevertheless, by 1966, fifteen other jurisdictions joined New York by abrogating one or both of the immunity doctrines.[19] However, the more startling fact of this tally is that in ten of these states, abrogation was accomplished by court decree.[20] Hence it is not surprising to find the decade ending in 1966 characterized as one in which a "major reshaping of governmental responsibility in tort [had taken] place through an interplay of legislative and judicial policy-making."[21] The reason for the drastic change was attributed to:

> Strong, persuasive voices . . . [continuing] to advocate a comprehensive eradication of the . . . immunity principle through legislative action . . . [as well as] . . . equally strong and persuasive judges, wearying of the seemingly endless wait for appropriate legislative action, [who] have

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to actions in the supreme court against individuals or corporations. . . .

15. Leflar & Kantrowitz, *Tort Liability of the States, supra* note 13, at 1407.

16. *Id.* at 1414-15.

17. *Id.*

18. *Id.*

19. Jurisdictions abrogating governmental immunity: City of Fairbanks v. Schaible, 375 P.2d 201 (Alas. 1962); Muscopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr 89 (1961); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Moliter v. Kaneland Community Unit Dist. No. 302, 13 Ill. 2d 11, 163 N.E.2d 89 (1959); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Hamilton v. City of Shreveport, 247 La. 784, 174 So. 2d 529 (1965); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); Walsh v. Clark County School Dist., 82 Nev. 414, 419 P.2d 774 (1966); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

HAWAII REV. STAT. §§ 662-1 to 662-15 (1968); UTAH CODE ANN. §§ 63-30-1 to 63-30-34 (1968); WASH. REV. CODE ANN. § 4.92.090 (Supp. 1972) (as interpreted by Kelso v. City of Tacoma, 63 Wash. 2d 913, 390 P.2d 2 (1964)).

Jurisdictions abrogating sovereign immunity: Stone v. Ariz. State Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Muscopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Lipman v. Brisbane Elem. School Dist., 65 Cal. 2d 230, 359 P.2d 465, 11 Cal. Rptr. 47 (1961); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

ALASKA STAT. ANN. § 09.50.250 (1973); HAWAII REV. STAT. §§ 662-1 to 662-15 (1968); IOWA CODE ANN. §§ 25A.1 to 25A.20 (1967); NEV. REV. STAT. §§ 41.031 to 41.039 (1967); UTAH CODE ANN. §§ 63-30-1 to 63-30-34 (1968); VT. STAT. ANN. tit. 12, §§ 5601-5605 (1973); WASH. REV. CODE ANN. § 4.92.090 (Supp. 1972).

20. *See* cases cited note 19 *supra.*

21. Van Alystyne, *Governmental Tort Liability: A Decade of Change,* 1966 U. ILL. L.F. 919, 976 (1966).

seized the initiative and decreed reform by judicial fiat in jurisdictions embracing nearly one-fourth of the nation.[22]

The next six years underscored the influence of the "strong and persuasive" legislative and judicial voices, and the increasing "weariness" of courts with legislative inaction. By 1972, thirteen states[23] abolished the governmental immunity doctrine with the courts taking the initiative on ten occasions. Nine states[24] adopted a similar posture regarding sovereign immunity with five of these being accomplished through the courts.

In 1973, the Pennsylvania Supreme Court also grew "weary" of legislative inactivity and became the most recent jurisdiction to abrogate the doctrine of governmental immunity.[25] In *Ayala v. Philadelphia Board of Public Education*,[26] governmental immunity was interred in Pennsylvania. The court, apparently taking encouragement from its prior rejections of charitable[27] and intra-family[28] immunities, refused to defer to legislative action.[29] Nevertheless it carefully limited its holding to governmental immunity.[30] Indeed, in an opinion filed the same day, the court upheld the doctrine of sovereign immunity. Although regretting it could not hold

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22. *Id.*

23. Spencer v. Gen. Hosp., 425 F.2d 479 (D.C. Cir. 1969); Veach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968) (but governmental immunity restored by statute, ARK. STAT. ANN. § 12-2901 (Supp. 1971)); Evans v. Bd. of County Comm'rs, 174 Colo. 197, 482 P.2d 968 (1971); Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970); Campbell v. State, Ind. , 284 N.E.2d 733 (1972); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968); Johnson v. Municipal University of Omaha, 184 Neb. 512, 169 N.W.2d 286 (1969); Willis v. Dept. of Conservation, 55 N.J. 534, 264 A.2d 34 (1970); Becker v. Beaudoin, 261 A.2d 896 (R.I. 1970).

IOWA CODE ANN. §§ 613A.1-613A.11 (Supp. 1973); OKLA. STAT. ANN. tit. 11, §§ 1751-1766 (Supp. 1972); ORE. REV. STAT. §§ 30.260-.300 (1971).

24. Spencer v. Gen. Hosp., 425 F.2d 479 (D.C. Cir. 1969); Evans v. Bd. of County Comm'rs, 174 Colo. 197, 482 P.2d 968 (1971); Smith v. State, 93 Idaho 795, 473 P.2d 968 (1971); Sims v. State, 94 Idaho 801, 498 P.2d 1274 (1972); Campbell v. State, Ind. , 284 N.E.2d 733 (1972); Willis v. Dept. of Conservation, 55 N.J. 534, 264 A.2d 34 (1970).

ILL. ANN. STAT. ch. 37, § 439.8 (Smith-Hurd 1966); NEB. REV. STAT. §§ 81-8,209 to 8,239 (1971); ORE. REV. STAT. §§ 30.260-.300 (1971); R.I. GEN. LAWS ANN. §§ 9-31-1 to 31-7 (Supp. 1972).

25. In the same year, sovereign immunity was abrogated for all state boards and agencies in Louisiana. Board of Comm'rs v. Splendour Shipping and Enterprise Co., La. , 273 So. 2d 19 (1973).

26. 453 Pa. 584, 305 A.2d 877 (1973).

27. Flagiello v. Pa. Hosp., 417 Pa. 486, 208 A.2d 193 (1965).

28. Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971).

29. Ayala v. Phila. Bd. of Pub. Educ., 453 Pa. 584, 599-801, 305 A.2d 877, 885 (1973).

30. *Id.* at 587 n.2, 305 A.2d at 877 n.2.

otherwise, the supreme court in *Brown v. Commonwealth*[31] felt the doctrine to be constitutionally, not judicially, mandated and susceptible only to legislative modification.[32] Whether the court will continue to adhere to this position may be open to doubt. As the following discussion of governmental immunity will demonstrate, the similarities of the governmental concept to its sovereign counterpart may be sufficiently close to facilitate the extension of *Ayala* to sovereign immunity.

III. Governmental Immunity

A. *Russell v. The Men of Devon*

Although not in unanimous agreement, most state supreme courts in the United States trace the origin of governmental immunity to 1788 and the English case of *Russell v. The Men of Devon*.[33] However, as will be hereafter developed, the doctrine may have merely become a settled principle of common law with *Russell* and not established by it. The definite day when the immunity doctrine arose is of crucial importance to courts contemplating its partial or total abrogation, since courts usually do not hold themselves obligated to follow a common law rule arising subsequent to the adoption of the Declaration of Independence.[34] Hence, if governmental immunity is ascribed to the *Russell* case, which was decided in 1788, the courts are free to alter it. The Wyoming Supreme Court has refused to accept this genesis of the immunity doctrine.[35] Its position is based on certain statements in *Russell* which suggest the doctrine may have originated some two centuries prior.

The *Russell* decision involved an action on the case against the inhabitants of the unincorporated county of Devon to recover damages done to the wagon of one Russell when it encountered a hole in the Devon bridge. The men of Devon demurred generally to charges that they breached their duty to maintain the bridge in a passable condition. Lord Kenyon, Chief Justice, sustained the demurrer. Without discussing it, he referred to a case cited in Brooke's Abridgement as precedent for a decision to disallow suit.[36] However, counsel for the men of Devon referred to the case cited as standing for the following principle:

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31. 453 Pa. 566, 305 A.2d 868 (1973).
32. *Id.* at 570-71, 305 A.2d at 870.
33. 100 Eng. Rep. 359 (K.B. 1788).
34. *E.g.*, Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957); Greenspan v. State, 12 N.J. 426, 431, 97 A.2d 390, 393 (1953); Loudon v. Loudon, 114 N.J. Eq. 242, 248, 168 A. 840, 844 (1933); Cawker v. Dreutzer, 197 Wis. 98, 116, 221 N.W. 401, 414 (1928).
35. Maffei v. Inc. Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959).
36. Russell v. The Men of Devon, 100 Eng. Rep. 359, 362 (K. B. 1788):
> Therefore, I think that this experiment ought not to be encouraged; there is no law or reason for supporting the action; and there is a precedent against it in Brooke: though even without that authority I should be of the opinion that this action cannot be maintained.

> . . .[T]hat if an highway be out of repair, by which my horse is mired, no action lies, "car est populus et surra reforme per presentment;" which must be understood to mean, that as the road ought to be repaired by the public, no individual can maintain an action against them for an injury arising from their neglect.[37]

After extensive research, the Wyoming Supreme Court has concluded this interpretation to be substantially correct.[38] Hence the case cited in Brooke lends significant support to the view that the doctrine of governmental immunity is much older than the *Russell* case.[39]

Furthermore, Lord Kenyon recognized a lack of precedent to sustain plaintiffs' position, and suggested an infinity of similar actions would be encouraged by a decision in plaintiffs' favor.[40] However, the chief justice placed considerable emphasis on the fact that the suit was not authorized by statute. He noted that in certain instances of negligence in law enforcement, suit could be maintained against the hundred[41] because it was authorized by law.[42] Consequently, he concluded that if the men of Devon were to be held liable in the action, recourse must be made to the legislature.[43]

Apparently in agreement with much of the major opinion by Lord Kenyon, the second opinion in *Russell* by Justice Ashurst also cites the precedent in Brooke's Abridgement and concludes that suit must be brought against the public, and not against the men of Devon in their individual capacities.[44] Justice Ashurst also stated an oft-quoted principle repugnant to modern minds that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience."[45]

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37. *Id.* at 360.

38. Maffei v. Inc. Town of Kemmerer, 80 Wyo. 33, 43, 338 P.2d 808, 810-11 (1959).

39. The case cited in Brooke is of ancient origin. Brooke died in 1558. *See id.* at 43, 338 P.2d at 811.

40. Russell v. The Men of Devon, 100 Eng. Rep. 359, 362 (K. B. 1788).

41. A unit of government under the Saxon organization of England of which "its most remarkable feature was the corporate responsibility of the whole for the crimes and defaults of the individual members." BLACK'S LAW DICTIONARY 874 (4th ed., rev., 1968).

42. Russell v. The Men of Devon, 100 Eng. Rep. 359, 362 (K. B. 1788).

43. *Id.*

44. *Id.* at 363.

45. *Id.* This principle has received comment in Annot., 75 A.L.R. 1196 (1931):

> The whole doctrine of governmental immunity from liability in tort rests upon rotten foundation. It is almost that in this modern age of comparative sociological enlightenment, and in a republic, . . . that the entire burden of damages resulting from the wrongful

In an opinion which apparently has had significant influence on the courts of other states,[46] the California Supreme Court in *Muscopf v. Corning Hospital District*,[47] interpreted *Russell* as disallowing suit for two reasons. The court first emphasized that the county was unincorporated and thus possessed no fund out of which to satisfy a damage judgment.[48] Next, the court focused on the statement of Ashurst that individual injury should be subordinated to the public convenience.[49] Indeed, the Pennsylvania Supreme Court not only subscribes to this interpretation of *Russell*, but also adds an additional ground—permitting such suit would result in an infinity of actions.[50] However, in view of the emphasis placed upon the absence of a statute authorizing suit, it is submitted the California and Pennsylvania Supreme Courts have misinterpreted *Russell*. Instead of focusing upon the main thrust of Lord Kenyon's argument, the courts have stressed the secondary reasons behind the decision. In fact, as the next section will illustrate, *Russell* was adopted by courts of this country for the proposition that no suit against local governmental units would be permitted without prior legislative consent.[51]

B. *Mower v. Leicester*

The First American decision sustaining governmental immunity was *Mower v. The Inhabitants of Leicester*[52] which involved the killing of a horse when it stepped into a hole in the Leicester bridge. Under law, the bridge was to be maintained by the inhabitants of Leicester. Citing *Russell* as precedent, the court denied recovery, reasoning:

> [Q]uasi-corporations, created by the legislature for purposes of public policy, are subject, by the common law, to an indictment for the negligence of duties enjoined on them; but they are not liable to an action for such neglect, *unless the action be given by some statute* . . . . This question is fully discussed in the case of *Russell & Al. vs. The Men of Devon*, cited at the bar and the reasoning there is conclusive against the action.[53]

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acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual and where it justly belongs.

46. *E.g.*, Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963).

47. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

48. *Id.* at 215, 359 P.2d at 459, 11 Cal. Rptr. at 91.

49. *Id.*

50. Ayala v. Phila. Bd. of Pub. Educ., 453 Pa. 584, 588-89, 305 A.2d 877, 879 (1973).

51. *See* notes 52-56 and accompanying text *infra*.

52. 9 Mass. 247 (1812).

53. *Id.* at 250 (emphasis added).

This was consistent with dicta expressed two years earlier by the same court in *Riddle v. The Proprieters of the Locks and Canals on Merrimac River.*[54]

The opinions in *Mower* and *Riddle* are significant. They not only distinguish between the liability of public corporations and the liability of private corporations, but also indicate the involuntary character of local governmental units—such units are forced agents of the state.[55] Consequently, it is logical that the holding in *Mower* and the dicta in *Riddle* emphasized *Russell* as standing for the proposition that units of local government, in the absence of statute, cannot be held liable in tort.[56]

As *Mower* and *Riddle* illustrate, early American judicial opinions involving governmental immunity stressed the public character of the functions performed by local governmental units. Eventually, however, the local units undertook performance of "proprietary" or business-like functions; when they did so, the courts, for purposes of tort liability, placed them on the same footing as private corporations, and held them liable when such performance was tortious.[57] This distinction between "governmental"

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54. 7 Mass. 169 (1810).

> Although quasi-corporations are liable to information or indictment, for a neglect of public duty imposed by law; yet it is settled in the case of *Russell et al. v. Inhabitants of the County of Devon*, that no private action can be maintained against them for breach of their corporate duty, *unless such action be given by statute.*

Id. at 186-87 (emphasis added).

55. As said by the court in *Riddle*: "We distinguish between private aggregate corporations, and the inhabitants or any district who are by statute invested with particular powers *without their consent.*" Riddle v. The Proprietors of the Locks and Canals on the Merrimac River, 7 Mass. 169, 186 (1810) (emphasis added).

56. This conclusion is supported by a footnote to the *Mower* decision wherein the editor of the volume states that *Russell* "seems to have been decided merely on the ground that no action would lie against the inhabitants of the town unless given by statute." Mower v. Leicester, 9 Mass. 247, 250 n.a (1812).

57. One of the early leading cases holding municipal corporations liable when performing a proprietary function is Bailey v. Mayor of New York, 3 Hill 531 (N.Y. Sup. Ct. 1842).

> [W]hen the city performs a service which might as well be provided by a private corporation, and particularly when it collects revenue from it, the function is considered a "proprietary" one, as which there may be liability for the torts of municipal agents within the scope of their employment. This is true where it supplies water, gas, or electricity, or where it operates a ferry, wharves or docks, an airport, or a public market. City hospitals have been held both governmental and proprietary. Where such a thing as a municipal garage, a housing unit, or an arts and crafts center is operated for profit, it nearly always has been held to be proprietary; and the same is true of more doubtful institutions such as hospitals.

W. PROSSER, LAW OF TORTS, *supra* note 3, at 980-81 (footnotes omitted).

and "proprietary" functions became generally accepted in nearly every jurisdiction in the United States.[58] Consequently, local governmental units developed a two-fold character: the one, governmental, wherein they enjoy immunity; the other, proprietary, where such status may subject them to liability. However, this classification has proved so unworkable as to prompt an exasperated New Jersey court to state that the "rules which courts have sought to establish in solving this problem are as logical as those governing French irregular verbs."[59]

C. *Governmental Immunity as an Extension of Sovereign Immunity*

When the state-local legal relationship is considered together with the sovereign immunity of the state, governmental immunity may be explained on grounds independent of *Russell v. The Men of Devon.*[60]

Local units, in absence of constitutional provisions to the contrary, derive their existence and their powers from express enactments of the state legislature.[61] Although local units are, in a sense, agencies of local self-government, they are also integral parts of state government existing to administer state policies and programs.[62] Indeed, for the great majority of people, they constitute the principal contact with government. No state now attempts, or has ever attempted, to conduct all of its government from its capital. Rather a state normally conducts most of its government through its local units over which, in the absence of constitutional provisions stipulating otherwise, it has absolute control.[63] " . . .

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58. *See* W. PROSSER, LAW OF TORTS, *supra* note 3, at 979.

59. Weeks v. City of Newark, 62 N.J. Super. 166, 176, 162 A.2d 314, 321 (1960).

60. 100 Eng. Rep. 359 (K.B. 1788). *See* Fuller & Casner, *Municipal Tort Liability in Operations*, 54 HARV. L. REV. 437 (1941). The view that governmental immunity derived from sovereign immunity arose after judicial acceptance of governmental immunity. "[I]t was not until stare decisis had done its work that the doctrine of sovereign immunity was introduced as a rationalization of the result." *Id.* at 438.

See also note 55 and accompanying text *supra* wherein statements regarding the involuntary character of New England towns contained in *Riddle* and *Mower* may lend support to the notion that governmental immunity derives from sovereign immunity.

61. 1 C. ANTIEU, MUNICIPAL CORPORATION LAW § 1.01 (Cum. Supp. 1972); R. COOLEY, HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS §§ 6-7 (1914); 1 E. YOCKLEY, MUNICIPAL CORPORATIONS §§ 11, 53 (1956).

62. R. COOLEY, *supra* note 61, at § 7.

63. [A]s said by Judge Cooley in an early work on Constitutional Limitations . . . , "in contradistinction to those governments where powers are concentrated in one man, or in one or more bodies of men, whose supervision and active control extends to all objects of government within the territorial limits of the state, the American system is one of *complete decentralization,* the primary and vital idea of which is that local affairs shall be managed by local authorities, and general affairs only by central authorities.

1 E. YOCKLEY, *supra* note 61, at § 4 (emphasis added).

[C]ounties, cities, etc. are political subdivisions of the state, and are included in the term *state*, which is the concrete whole. Whatever is done by such division under and by virtue of the permission and mandate of the state only, is the act of the state *quo ad hoc* . . . ."[64]

This unitary view of government is significant for courts contemplating the abrogation of governmental immunity when sovereign immunity has already been abolished. When the legislature of the New York waived that state's immunity from liability,[65] its Court of Appeals ruled that the legislature also waived immunity of local governmental units,[66] on the premise that the political subdivisions had no independent sovereignty.[67] Similarly, the Washington Supreme Court, following the reasoning of the New York court, ruled that when the Washington legislature waived that state's immunity,[68] it also waived the immunity of the local units.[69] The court reasoned that the common law right of sovereign immunity is not in the local units, but resides in the state from which the immunity is derived.[70] The immunity of local units, like their sovereignty, the court concluded, is in a sense borrowed.[71]

It is submitted that this view of governmental immunity as an extension of sovereign immunity describes the true relationship of *Russell v. The Men of Devon*[72] to the latter doctrine. Two reasons tend to support this conclusion. First, *Russell* may merely stand for the proposition that suit against governmental units may not be maintained without legislative consent.[73] Second, the doctrine of sovereign immunity protected the sovereign from tort liability unless he consented to suit.[74] Consequently, holding governmental units to be an extension of the sovereign doctrine may be nothing more than a reiteration of *Russell*.

D. *Governmental Immunity in Pennsylvania*

The origins of governmental immunity in Pennsylvania are somewhat obscure. *Russell v. The Men of Devon*[75] was recog-

64. State v. Levy Court, 17 Del. 597, 603, 43 A. 522, 524 (1899).
65. *See* note 14 *supra*.
66. Bernadine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).
67. *Id.* at 365, 62 N.E.2d at 605.
68. WASH. REV. CODE § 4.92.090 (Supp. 1972).
69. Kelso v. City of Tacoma, 63 Wash. 2d 913, 390 P.2d 2 (1964).
70. *Id.* at 916, 390 P.2d at 5.
71. *Id.*
72. 100 Eng. Rep. 359 (K.B. 1788).
73. *See* notes 40-56 and accompanying text *supra*.
74. *See* notes 102-117 and accompanying text *infra*.
75. 100 Eng. Rep. 359 (K.B. 1788).

nized in the commonwealth in *Dean v. New Milford Township.*[76] There, the court interpreted *Russell* as standing on two grounds:

> . . . 1. that [the] county was not a corporation, and 2. that there was no county fund out of which satisfaction could be made, and consequently if damages were recovered against the county, it would have to be levied on one or two individuals, who would have no means of reimbursing themselves. The inference is by no means unreasonable that had not these reasons existed, the judgment would have been different.[77]

Since the defendant township was incorporated and possessed a fund out of which to pay damages, the court accordingly held it liable.

The case generally cited as establishing the rule of governmental immunity in Pennsylvania is *Fox v. Northern Liberties.*[78] In that case, plaintiff was denied relief for the wrongful seizure of his horse by the superintendent of police. However, the basis for the decision was not on the ground of governmental immunity, but on the ground that the act of the superintendent was so outside the scope of his authority that not even a private employer would be responsible for the act of an employee under the doctrine of *respondeat superior.*[79] Thus, it is doubtful that *Fox* established a general rule of governmental immunity in the Commonwealth. Rather it would apparently be a more accurate conclusion that the rule evolved in a piecemeal, case-by-case, fashion.[80] Hence, it is not surprising to find many seemingly inconsistent and illogical exceptions to the doctrine.

Liability existed where the act the local unit was mandated

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76. 5 W. & S. 545 (Pa. 1843).

77. *Id.* at 547.

78. 3 W. & S. 103 (Pa. 1841). *See also* Boorse v. Springfield Twp., 377 Pa. 109, 110, 103 A.2d 708, 709 (1954); Stouffer v. Morrison, 400 Pa. Commonwealth Ct. 497, 499, 162 A.2d 378, 379 (1960).

79. Fox v. Northern Liberties, 3 W. & S. 103, 106 (Pa. 1841).

80. This is illustrated by cases arising during the period from 1860 to 1890. Carr v. Northern Liberties, 35 Pa. 324 (1860) (liability not imposed on tortious performance of discretionary function for fear of assuming improper control over municipal affairs); Alcorn v. City of Phila., 44 Pa. 348 (1863) (doctrine of respondeat superior held not to apply to appointed officers of municipal corporations); Elliot v. City of Phila., 73 Pa. 347 (1874) (intentional torts of city employees outside scope of authority; respondeat superior does not apply); School Dist. v. Fulss, 98 Pa. 600 (1881) (negligence of independent contractor not imputed to school district; public school system analogized to public charity); County of Lehigh v. Hoffort, 116 Pa. 119, 9 A. 177 (1887) (failure to exercise discretionary powers not a basis of liability); Ford v. Kendall Borough School Dist., 121 Pa. 543, 15 A. 812 (1888) (not only does a less stringent rule of respondeat superior apply to public corporations than to private corporations, but an even less stringent rule applies to school districts; public school system again analogized to public charity); Kies v. City of Erie, 135 Pa. 144, 19 A. 942 (1890) (broad statement respondeat superior does not apply to acts of municipal employees).

by statute,[81] but not where the function was merely authorized by legislation.[82] Liability attached where the function was determined "proprietary," but not where it was deemed "governmental."[83] At times, mismanagement of public property gave rise to liability,[84] while in other instances it did not.[85] Consequently, the rule of governmental immunity, a product of piecemeal evolution, became the subject of piecemeal judicial erosion. Perhaps the reason the doctrine was not completely abrogated earlier in Pennsylvania may be found in the following words of Chief Justice Jones:

> Even though the reasons for originating governmental immunity are now anachronistic, the Commonwealth may wish to retain the rule for other, more modern reasons. Only the legislature can deal with the field of immunity in all of its state, municipal corporation and school district aspects by enacting a comprehensive bill based on extensive hearings and investigations. On the other hand we continue to be confronted with the problem on a most fragmented basis.[86]

Notwithstanding this acknowledgement of its inability to adequately solve the problem inherent in its traditional case-by-case approach, the supreme court, seven years later in *Ayala v. The Philadelphia Board of Public Education*,[87] took it upon itself to abolish the doctrine of governmental immunity. In response to a "let-the-legislature-do-it" argument, the court emphasized the reasoning

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81. *E.g.*, McCormick v. Allegheny County, 263 Pa. 146, 106 A. 203 (1919) (failure to maintain sidewalk); Rapho v. Moore, 68 Pa. 404 (1874) (failure to maintain bridges); Dean v. New Milford Twp., 3 W. & S. 103 (Pa. 1841) (failure to maintain roads).

82. *E.g.*, Carr v. Northern Liberties, 35 Pa. 324 (1860) (construction of drainage system).

83. *E.g.*, Shields v. Pittsburgh School Dist., 408 Pa. 388, 184 A.2d 240 (1962); Morris v. Mt. Lebanon School Dist., 393 Pa. 633, 144 A.2d 737 (1958); Hill v. Allentown Housing Auth., 373 Pa. 92, 95 A.2d 879 (1953).

This distinction provoked an observation by the late Chief Justice Cohen in Stouffer v. Morrison, 400 Pa. 497, 502-03, 162 A.2d 378, 381 (1960) (concurring opinion):

> The attempt to determine whether liability exists when a state or municipal activity is conducted negligently by the test of whether it is a governmental or proprietary function has resulted in complete confusion. . . .
>
> We have treated torts by public employees on an *ad hoc* basis. No course has been chartered to guide the courts in determining when and to what effect liability should be imposed. Our prior decisions can neither be distinguished nor justified.

84. *E.g.*, Briegel v. City of Phila., 135 Pa. 451, 19 A. 1038 (1890) (defective privy adjoining school house).

85. *E.g.*, Kies v. City of Erie, 135 Pa. 144, 19 A. 942 (1890) (fire door suddenly thrown across a public sidewalk).

86. Dillon v. York School Dist., 422 Pa. 103, 106, 220 A.2d 896, 898 (1966).

87. 453 Pa. 584, 305 A.2d 877 (1973).

it utilized in its prior abrogation of charitable[88] and intra-family[89] immunities: "We closed our courtroom doors without legislative help and we can likewise open them."[90]

The court[91] followed the lead of the majority of courts in this country by tracing the origin of governmental immunity to *Russell v. The Men of Devon*[92] and its subsequent adoption in the United States by *Mower v. Leicester*.[93] *Russell* is interpreted by the court to deny liability for three reasons: 1) fear of an infinity of actions; 2) lack of adequate funds to satisfy a damage judgment; and 3) subordination of the individual claim to the public convenience.[94]

However, it is submitted the court may have misinterpreted the actual basis of the *Russell* decision. As discussed,[95] *Russell* may merely stand for the proposition that a governmental unit may not be liable in tort without prior statutory authorization. Had the *Ayala* court interpreted *Russell* on this basis, the similarities between governmental and sovereign immunity in Pennsylvania would become more evident. Indeed, in an opinion filed the same day with *Ayala*, the court, in *Brown v. Commonwealth*,[96] upheld the doctrine of sovereign immunity. Although basing its reasoning on a state constitutional provision, the court reached the same conclusion as *Russell*—no suit without legislative consent.[97] Consequently, should the constitutional arguments favoring sovereign immunity in Pennsylvania be overcome, this similarity between the immunity doctrines may enable the abrogative reasoning in *Ayala* to more easily extend to the sovereign immunity issue.

It should also be noted that, although *Ayala* is couched in

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88. Flagiello v. Pa. Hosp., 417 Pa. 486, 208 A.2d 193 (1965).

89. Falco v. Pados, 444 Pa. 372, 382 A.2d 351 (1971).

90. Ayala v. Phila. Bd. of Pub. Educ., 453 Pa. 584, 600, 305 A.2d 877, 885 (1973), referring to Badigan v. Badigan, 9 N.Y.2d 472, 481, 174 N.E.2d 718, 724, 215 N.Y.S.2d 35, 43 (1961), as cited in Falco v. Pados, 444 Pa. 372, 382, 282 A.2d 351, 356 (1971).

The origin of this oft-cited passage is Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash. 2d 162, 178, 260 Pa. 765, 774 (1953), wherein the court, faced with an argument that the abolition of charitable immunity from tort properly belongs to the legislature, said:

> However, having previously undertaken this function, and having now considered court-decided policy is no longer valid, there seems to be no compelling reason why we must wait for legislative action. *We closed our courtroom doors without legislative help, and we can likewise open them.* It is not necessary that courts be slow to exercise a judicial function simply because they have been fast to exercise a legislative one (emphasis added).

91. Ayala v. Phila. Bd. of Pub. Educ., 453 Pa. 584, 588-89, 305 A.2d 877, 879 (1973).

92. 100 Eng. Rep. 359 (K.B. 1788).

93. 9 Mass. 247 (1812); *see* notes 33-59 and accompanying text *supra*.

94. Ayala v. Phila. Bd. of Pub. Educ., 453 Pa. 584, 588-89, 305 A.2d 877, 879 (1973).

95. *See* notes 40-51 and accompanying text *supra*.

96. 453 Pa. 566, 305 A.2d 868 (1973).

97. *Id.* at 570-72, 305 A.2d at 870.

broad language,[98] subsequent decisions may limit it to school districts. Two factors may support this observation. First, the decision was not unanimous—Chief Justice Jones and Justices Eagen and O'Brien dissented. Consequently, future decisions seeking to apply *Ayala* to non-school district governmental units may encounter stiff opposition. Second, the majority opinion of Justice Roberts explicitly declares in a footnote that all prior decisions contrary to *Ayala* are overruled.[99] It may be significant that all the cases cited in that footnote, but one,[100] deal with a school district governmental unit. Hence, it is submitted that subsequent decisions may very well limit *Ayala* to its facts, rather than adopt it as apparently intended by Justice Roberts—as an abolition of immunity for all governmental units save the state.[101]

IV. Sovereign Immunity

A. *"The King can do no wrong."*

For reasons inherent in sovereignty, the state historically has been beyond suit. The English King, who represented the state's sovereignty, could not be sued in his own courts unless he consented.[102] For the sovereign to be amenable to suit would be in-

98. "We now hold that the doctrine of governmental immunity . . . long since devoid of any valid justification . . . is abolished in this Commonwealth." Ayala v. Phila. Bd. of Pub. Educ., 453 Pa. 584, 587, 305 A.2d 877, 878 (1973).

99. *Id.* at 587 n.3, 305 A.2d at 878 n.3:

> Prior decisions to the contrary are overruled. See, e.g., Smeltz v. Harrisburg, 440 Pa. 224, 269 A.2d 466 (1970); Dillon v. York City School District, 422 Pa. 103, 220 A.2d 896 (1966); Shields v. Pittsburgh School District, 408 Pa. 388, 184 A.2d 240 (1962); Harris v. Mount Lebanon Township School District, 393 Pa. 633, 144 A.2d 737 (1958); Boorse v. Springfield Twp., 377 Pa. 109, 103 A.2d 708 (1954); Carlo v. Scranton School District, 319 Pa. 417, 179 A. 561 (1935); Ford v. School District, 121 Pa. 543, 15 A. 812 (1888).

100. Boorse v. Springfield Twp., 377 Pa. 109, 103 A.2d 708 (1954).

101. This conclusion is apparently supported by a subsequent introduction of a bill in the Senate of the General Assembly of Pennsylvania, S.B. 1128, 157th Sess. (1973), which reads:

> AN ACT
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> Making municipalities and political subdivisions liable to suits in the same manner, courts and cases as individuals and other entities. The General Assembly of the Commonwealth of Pennsylvania hereby enacts
>
> as follows:
>
> Section 1. Suits may be brought against municipalities and political subdivisions in the same manner, in the same courts, and in the same cases as they are brought against individuals and other entities.

The mere introduction of this bill indicates that *Ayala* is not being read, at least by some legislators, to cover the governmental immunity of municipalities and political subdivisions of the state.

102. 1 F. Pollack & F. Maitland, History of English Law 518 (2d ed. 1909):

consistent with the idea of sovereignty. However, the English King did sometimes consent to suit. Official wrongs were redressed in his Court of the Exchequer with the Petition of Right as one method of obtaining relief.[103] This view of the sovereign character of the state appears to have been universally accepted by all the nations in the western world. It is represented by the political thinking of Thomas Hobbs and is also present in the political writings of the French theorist, Jean Bodin.[104]

The corollary of the idea that the English King could not be sued save by his own consent, was the doctrine that "the King could do no wrong."[105] As Blackstone put it, "the king, moreover, is not only incapable of *doing* wrong but of *thinking* wrong: he can never mean to do an improper thing . . . ."[106] However, the corollary has had apparently little influence in the United States regarding the development of sovereign immunity. The United States Supreme Court has said the concept that the sovereign can do no wrong has no standing in American jurisprudence. It is wholly alien to the American doctrine expressed in constitutions and laws, federal and state, that public officials shall not be held

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> He cannot be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his [the King's] court, is we may say, an accident.

103. Petition is al the remedy the subject hath when the king seiseth his land or taketh away his goods from him havinge no title *by order of his lawes so to do*. . . . And therefore is his petition called a peticion of right, because of the right the subject hath against the king *by order of his lawes* to do the thing he sueth for.

Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. REV. 141, 149-50 (1922). *See* the discussion of Traynor, C.J., in Muscopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 213, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 91 (1961).

104. *See* Borchard, *Governmental Responsibility in Tort*, 36 YALE L..J 757, 784-85 (1926-27).

105. *But see* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 5 (1964):

> Indeed it is argued by the scholars on what seems adequate evidence that the expression "the King can do no wrong" originally meant precisely the contrary to what it later came to mean. "[I]t meant that the king must not, was not allowed, was not entitled to do wrong. . . .

Id. citing Ehrlich, *Proceedings Against the Crown*, 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 5 (Vinogradoff ed. 1921).

106. 1 W. BLACKSTONE COMMENTARIES *246. However, Blackstone's point was not that the king was free to do as he pleased without restraint, but rather that, since the king could do no wrong, any wrong that was done in his name was, in the eyes of the law, not done by the king at all.

> The king can do no wrong, which antient and fundamental maxim is not to be understood, as if everything transacted by the government was of course just and lawful, but means two other things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people. . . . And secondly, it means that the prerogative of the crown extends not to do any injury: it is created for the benefit of the people and therefore cannot be extended to their prejudice.

Id.

accountable for their actions.[107]

Nevertheless, there exists, and has existed, in the United States for a period long before the adoption of the United States Constitution, a strong public sentiment against the policy of permitting an individual to sue a state without its consent.[108] This sentiment is reflected in the Eleventh Amendment, adopted in 1798, which forbids an individual to use the federal judicial process to sue another state:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[109]

In *Beers v. Alabama*,[110] Chief Justice Taney stated the policy embodied in the Eleventh Amendment when he wrote: "It is an established principle of jurisprudence in all civilized nations that the sovereign can not be sued in its own courts, or in any other, without its consent and permission . . . ."[111] In the same vein, the Minnesota Supreme Court, in deciding to hold virtually all local governmental units liable in tort, refused to abolish the immunity of the state itself.[112] In a footnote, the court referred to a much earlier opinion in which it had said: " 'Since the adoption of the Eleventh Amendment to the Constitution, it has been uniformly held that suit by an individual can not be maintained against the state without its consent.' "[113]

This sentiment expressed by the Minnesota court is apparently shared by the supreme courts of most other states, particularly prior

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107. Langford v. United States, 101 U.S. 341, 343 (1880).

108. Alexander Hamilton, speaking of the sovereign immunity of the state in No. 81 of *The Federalist* said:

> It is inherent in the nature of sovereignty not to be answerable to the suit of an individual *without its consent*. This is the general sense and general practice of mankind; and this exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union.

The Federalist No. 81, at 508 (H. Lodge ed. 1888) (A. Hamilton).

109. Indeed, the eleventh amendment was a direct response to the decision of the United States Supreme Court in Chisholm v. Georgia, 2 U.S. (2 Dallas) 419 (1792), in which the State of Georgia was held sueable in the federal courts by a citizen of another state without the defendant state's consent. The decision was supported by the language of the U.S. CONST. art. 3, § 2, cl. 1, which outlines the power of the federal judiciary.

110. 61 U.S. (20 How.) 527 (1879).

111. *Id.* at 529.

112. Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1965).

113. *Id.* at 291 n.42, 118 N.W.2d at 803 n.42, citing Berman v. Minn. State Agricultural Soc'y, 93 Minn. 125, 127, 100 N.W. 732, 733 (1904).

to 1961.[114] Nevertheless, since that time, the courts of nine states have circumvented the "no-suit-without-consent" argument by judicially abrogating sovereign immunity.[115] These courts have acted primarily on the basis that the doctrine was judicially created, and as such could be judicially abrogated.[116] Apparently the public sentiment against an individual suing a state without its consent has lost some of its momentum. However, most courts still continue to adhere to the old philosophy. Indeed, some courts attribute this adherence to state constitutional provisions which have been interpreted to shift the power to abrogate an initially common law doctrine to the exclusive domain of the legislature.[117] As the next section will indicate, Pennsylvania is an example of this type of jurisdiction continuing to uphold sovereign immunity.

B. *Sovereign Immunity in Pennsylvania*

Apparently, Pennsylvania falls into the cateogry of courts upholding the doctrine of sovereign immunity as a creature of the state constitution. In two recent decisions dealing with the question of sovereign immunity, *Brown v. Commonwealth*[118] and *Biello v. Pennsylvania Liquor Control Board*,[119] the Pennsylvania Supreme Court held that the immunity of the commonwealth is constitutionally, not judicially, mandated.[120] Nevertheless, sovereign immunity in Pennsylvania has also been recognized as having common law origins.

In *Biello*, the court traced the beginnings of sovereign immunity to *Respublica v. Sparhawk*.[121] There a suit was brought to recover the value of flour seized by the Pennsylvania War Board pursuant to a legislative directive to prevent British capture of supplies should the latter occupy Philadelphia. In response to plaintiff's argument that "the burden of war ought to be equally borne by all who are interested in it, and not fall disproportionately heavy on a few,"[122] the court held "that it is better to suffer private mischief, than a public inconvenience; and rights of necessity, form a part of our law."[123] The court further stated that it possessed au-

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114. *See* notes 11-32 and accompanying text *supra*.
115. *See* notes 19 and 24 and accompanying text *supra*.
116. *See* notes 141-153, 167-205 and accompanying text *infra*.
117. *See* notes 167-205 and accompanying text *infra*.
118. 453 Pa. 566, 571, 305 A.2d 868, 870 (1973).
119. Pa. , 301 A.2d 849, 852 (1973).
120. Article I, Section 11 of our Constitution compels the conclusion . . . that this Commonwealth's immunity is constitutionally, not judicially mandated. *'Suits may be brought against the Commonwealth* in such manner, in such courts and in such cases *as the Legislature may by law direct.'*

Brown v. Commonwealth, 453 Pa. 566, 571, 305 A.2d 868, 870 (1973) (emphasis by the court).
121. 1 Dallas 357 (Pa. 1788).
122. *Id.* at 362.
123. *Id.* Note the similarity of this statement to that of Ashurst, J. in

thority only by statute to review proceedings properly brought before the comptroller-general.[124] However, since the latter had no jurisdiction in the matter, the court was of the opinion that it was without power to grant plaintiff relief even if he were entitled to it.[125]

By conceding its lack of power, the court apparently concurred with an earlier argument by the state's Attorney General that the commonwealth could not be sued unless by express legislative consent.[126] Hence it is submitted that the doctrine of sovereign immunity arose in Pennsylvania from the same judicial philosophy that may have decided governmental immunity in *Russell v. The Men of Devon*[127]—no suit without prior legislative authorization.

Sparhawk was subsequently extended in *Black v. Republicam*[128] wherein Pennsylvania galley captains, fleeing the British, seized private provisions to feed their own troops and promised the plaintiff landowner compensation. The court denied recovery holding that since the captains had no authority to contract, there could be no recovery *ex contractu*.[129] Moreover, since *Sparhawk* was cited to preclude court jurisdiction in a tort suit against the state, there could be no recovery *ex delicto*.[130]

After noting the common law origins of sovereign immunity in its *Sparhawk* and *Black* decisions, the court in *Biello* concluded that it might be disposed to a consideration of the abrogation of the much criticized doctrine.[131] However, it refused to do so on the basis that Article I, Section 11 of the Pennsylvania Constitution has been "consistently . . . interpreted to mean that no suit may be maintained against the state in tort until the legislature specifically has provided for such an action."[132]

Russell v. The Men of Devon, 100 Eng. Rep. 359, 363 (K.B. 1788). *See* notes 44-45 and accompanying text *supra*.

124. Respublica v. Sparhawk, 1 Dallas 357, 363 (Pa. 1788).

125. *Id.*

126. Considering this is as a case immediately between Sparhawk and the Commonwealth, it is clear, that a sovereign is not amenable to suit in any court unless by his own consent (1 Black. Com. 242). And therefore, unless the Commonwealth has expressly consented, there is nothing in the constitution of this court which can warrant their sustaining the present proceedings.

Id. at 363.

127. *See* notes 41-43, 52-56 and accompanying text *supra*.

128. 1 Yeates 140 (Pa. 1792).

129. *Id.* at 142.

130. *Id.* at 141.

131. Biello v. Pennsylvania Liquor Control Bd., Pa. , 301 A.2d 849, 851 (1973).

132. *Id.* The full text of Article I, Section 11 reads:

All courts shall be open; and every man for an injury done to him in his lands, goods, person or reputation shall have a rem-

The significant interpretation of the provision in Article I, Section 11, appears to be the 1919 case of *Collins v. Commonwealth*:[133]

> It is clear that the Commonwealth, being sovereign, can not be sued without her consent which may be given by the Constitution or by statute. If the Constitution is silent on the subject, a legislative authority, being uncontrolled, is supreme; but if the Constitution speaks, then the legislative consent can become effective only if the legislature has complied with the requirements imposed upon it in passing the consenting statute; for otherwise it is authorized to consent.
>
> Article I, Section 11, of our Constitution provides, inter alia, that "suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the legislature may by law direct."[134]

In *Commonwealth v. Berks County*,[135] the next major case dealing with this subject, the court provided that "[s]o far as Pennsylvania Courts are concerned, it is only as the legislature may by law direct that suits may be brought against the Commonwealth: Pennsylvania Constitution, Article I, Section 11."[136]

Berks County was subsequently cited with approval in 1972 by *Commonwealth v. Orsatti*.[137] Consequently, the doctrine of sovereign immunity in Pennsylvania, although initially a creature of the common law, has received substantial support from Article I, Section 11 of the Pennsylvania Constitution, and the judicial interpretations placed upon it.[138] So much support, in fact, that the Pennsylvania Supreme Court has deemed itself powerless to abolish it.

V. Obstacles To Judicial Abrogation

For years, the great majority of legal scholars and students of government have generally condemned the principles of governmental and sovereign immunity, and have called for their abolition.[139] Nevertheless, it has only been within the last twenty

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edy by due course of law, and right and justice administered without fail, denial, or delay. *Suits may be brought against this Commonwealth in such manner, in such courts and in such cases as the legislature may by law direct* (emphasis added).

133. 262 Pa. 572, 106 A. 229 (1919).

134. *Id.* at 575, 106 A. at 230.

135. 364 Pa. 447, 72 A.2d 129 (1950).

136. *Id.* at 449, 72 A.2d at 130.

137. 448 Pa. 72, 76, 292 A.2d 313, 316 (1972).

138. *See also* Meagher v. Commonwealth, 439 Pa. 532, 266 A.2d 684 (1970); Bannard v. N.Y.S. Natural Gas Corp., 404 Pa. 269, 172 A.2d 306 (1961); Brewer v. Commonwealth, 345 Pa. 144, 27 A.2d 53 (1942); Bell Telephone Co. v. Lewis, 313 Pa. 374, 169 A. 571 (1934).

139. *See, e.g.*, Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25); *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1926-27); Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941); Leflar & Kantrowitz, *Tort Lia-*

years that courts have really begun to act.[140]

A. *Legislative Policy*

Although general agreement exists that immunity problems can be most satisfactorily resolved by legislative action,[141] most state legislatures have neglected to act.[142] Whether this neglect justifies court abolition of the doctrines to force legislative action is open to doubt. Admittedly, judicial abrogation has usually produced subsequent legislative activity.[143] Critics of this approach

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bility of the States, 29 N.Y.U.L. REV. 1363 (1954); Smith, *Municipal Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919 (1966).

140. *See* notes 11-32 and accompanying text *supra*.

141. *See* Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 1, 3 (1924-25).

142. *See* notes 11-32 and accompanying text *supra*.

143. ARIZ. REV. STAT. ANN. § 26-314 (Supp. 1972) (statutory supplement to Stone v. Ariz. State Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963), which abrogated sovereign immunity); ARK. STAT. ANN. § 12-2901 (Supp. 1971) (restored governmental immunity abrogated by Parish v. Pitts, 244 Ark. 195, 427 P.2d 335 (1967)); CAL. GOV'T CODE §§ 810-996.6 (West. 1966) (detailed tort claims act subsequent to Muscopf v. Corning Hosp., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), which abrogated governmental and sovereign immunity); COLO. REV. STAT. ANN. §§ 130-11-1 to 130-11-17 (Cum. Supp. 1972) (governmental immunity act restores much immunity abrogated by Evans v. Bd. of County Comm'rs, 174 Colo. 197, 482 P.2d 968 (1971)); FLA. STAT. ANN. § 95.24 (1960); *id.* § 95.241 (Supp. 1972) (statutory regulation passed subsequent to the abrogation of governmental immunity by Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957)); IDA. CODE ANN. §§ 6-901 to 6-928 (Cum. Supp. 1973) (tort claims act following Smith v. State, 95 Idaho 795, 473 P.2d 968 (1971), which abrogated sovereign immunity); ILL. ANN. STAT. ch. 85, §§ 1-101 to 10-101 (Smith-Hurd 1966) (restored governmental immunity to some extent following Moliter v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959)); MICH. STAT. ANN. § 3.996 (107) (Supp. 1972) (restored governmental immunity for "governmental" functions following its abrogation in Williams v. City of Detroit, 374 Mich. 231, 111 N.W.2d 1 (1961)); MINN. STAT. ANN. §§ 466.01-.17 (1963) (followed Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962) which abrogated governmental immunity); NEB. REV. STAT. §§ 23-1401 to -2420 (1970) (followed Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 795 (1968), and Johnson v. Municipal Univ. of Omaha, 184 Neb. 512, 169 N.W.2d 286 (1969), which abrogated governmental immunity); NEV. REV. STAT. §§ 41.031 to .039 (1969) (followed judicial abrogation of governmental immunity in Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963), and Walsh v. Clark County School Dist., 82 Nev. 414, 419 P.2d 774 (1966)); N.J. STAT. ANN. §§ 59:1-1 to 14-1 (Supp. 1973) (detailed tort claims act following abrogration of governmental and sovereign immunity by Willis v. Dept. of Conservation, 55 N.J. 534, 264 A.2d 34 (1970)); R.I. GEN. LAWS ANN. §§ 9-31-1 to 31-7 (Supp. 1972) (followed abrogation of governmental immunity in Becker v. Beaudoin, 261 A.2d 896 (R.I. 1970)); WIS. STAT. ANN. §§ 345.05 (1971), 895.43 (1966) (imposed some limitations on abrogation of governmental immunity by Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962)).

urge, however, that it involves, among other things, policy determinations and thus an invasion of legislative prerogatives.[144]

It must be noted that courts abrogating the immunity doctrines base their decisions almost solely on the ground that the doctrines were originally judicially created, and, as such, are subject to judicial abolition.[145] However, this basis may be subject to challenge on the grounds that abrogation of immunity is still a problem for the legislature despite the initial ruling having been made by the court.[146] Although the common law doctrines may have been originally recognized by the judiciary, in virtually every state the legislature has shared in its development.[147] Consequently, the enactment of isolated statutes removing immunity in limited areas has been described as a legislative declaration of intent in the matter of governmental responsibility. Prior to the enactment of a comprehensive tort claims act[148] by its legislature, the Iowa Supreme Court, in refusing to abrogate governmental immunity, stated:

> Although the doctrine of governmental immunity may have been of ancient judicial origin, it has been recognized as the policy of the state by the limited action of legislature toward relaxation . . . . Had the legislature favored complete abrogation of the immunity rule . . . it could have said so and authorized the purchase of insurance . . . . It is significant the legislature did not do so.[149]

According to this view, enactment of isolated statutes by the legislature in the tort immunity field indicates the presence of some larger legislative policy regarding the immunity doctrines with which the courts should not interfere.

However, the opposite view was taken by the California Supreme Court. In its decision abrogating governmental and sovereign immunity, the court reasoned that in the absence of a comprehensive statute to cover the field, it possessed the authority to abolish immunity in those areas where the legislature had not acted.[150] Even in the District of Columbia, the federal court of

144. *E.g.*, Haney v. City of Lexington, 386 S.W.2d 738, 743 (Ky. 1964) (dissenting opinion); Weisner v. Bd. of Educ., 237 Md. 391, 392, 206 A.2d 560, 561 (1965); Rice v. Clark County, 79 Nev. 253, 259, 382 P.2d 605, 609 (1963) (dissenting opinion).

145. *See* notes 154-205 and accompanying text *infra*.

146. *E.g.*, Clark v. Ruidoso-Hondo Valley Hosp., 72 N.M. 9, 12, 380 P.2d 168, 170 (1963).

147. *See generally* Leflar & Kantrowitz, *Tort Liability of the States, supra* note 13; Van Alystyne, *Governmental Tort Liability: A Decade of Change, supra* note 18.

148. IOWA CODE ANN. §§ 25A.1-A.20 (1967).

149. Boyer v. Iowa High School Athletic Ass'n, 256 Iowa 337, 346, 127 N.W.2d 606, 612 (1964).

150. Muscopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 215-16, 359 P.2d 457, 460-61, 11 Cal. Rptr. 89, 93-94 (1961). Today a comprehensive tort claims act is in force in California. *See* CALIF. GOV'T. CODE §§ 810-996.6 (West 1966).

appeals apparently vacated an earlier deference[151] to Congressional policy in the Federal Tort Claims Act by overruling governmental immunity on its own initiative.[152] Hence, it is submitted that courts, determined to abolish either governmental or sovereign immunity, will act despite existing legislative enactments narrowing the immunity. Of course, the legislature has the last word and can restore the immunity if it is considered the better policy.[153]

B. *Constitutional or Statutory Adoption of Pre-Independence Common Law*

In several states another apparent, serious obstacle to judicial abrogation of existing common law immunity is the presence of either a statutory or constitutional provision which provides that the common law shall remain in force until altered or repealed by the legislature.[154] The common law referred to is generally considered to be that body of law in force in England prior to the Declaration of Independence.[155] However, it does not include all the common law, but only that law, general and not local to England, which is applicable to the habits and conditions of our society, and in harmony with the spirit and objects of our institutions.[156] Furthermore, courts in the United States do not consider themselves

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151. Urow v. District of Columbia, 315 F.2d 351 (D.C. Cir. 1963), regarding the enactment of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1965).

152. Spencer v. Gen. Hosp., 425 F.2d 479 (D.C. Cir. 1966).

153. *See, e.g.*, Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968), in which the court judicially abrogated sovereign immunity. However, the Arkansas legislature completely restored it. ARK. STAT. ANN. § 12-2901 (Supp. 1971). *But see* Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961), which abolished municipal governmental immunity in Michigan. The immunity was subsequently restored by the legislature regarding "governmental" functions. MICH. STAT. ANN. § 3.996 (107) (Supp. 1972). However, the court declared the statute unconstitutional in Maki v. City of East Tawas, 385 Mich. 151, 118 N.W.2d 593 (1971). So far the legislature has not reacted and apparently the court has had, at least tentatively, the "last" word.

154. *E.g.*, FLA. STAT. ANN. § 2.01 (1961); ILL. ANN. STAT. ch. 28, § 1 (Smith-Hurd 1969); KY. CONST. § 233; MINN. CONST., sched., § 2; WIS. CONST. art. 14, § 13.

> Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.

WIS. CONST. art. 14, § 13.

155. *See* note 34 and accompanying text *supra*.

156. *E.g.*, ARIZ. REV. STAT. ANN. § 1-201 (1956):

> The common law only so far as it is consistent with and adapted to the natural physical conditions and the necessities . . . or established customs of the people is adopted. . . .

bound by common law principles arising after 1776.[157]

Particularly significant is the assumption shared by many courts that governmental immunity arose in 1788 with the English decision of *Russell v. The Men of Devon*.[158] If such an assumption is correct,[159] a provision resting jurisdiction in the legislature to change pre-Independence common law will not constitute a barrier to judicial abrogation. The doctrine will be of post-Independence vintage and not within the scope of the enactment. Hence the court will be free to modify it.[160]

Although courts may circumvent the constitutional or statutory provisions by declaring governmental immunity as having arisen subsequent to the Declaration of Independence, other methods have been adopted to avoid this obstacle. This is especially true where the enactment does not explicitly empower the legislature to alter the common law.[161] The Michigan Supreme Court has adopted an interpretive approach to avoid the constitutional provision. In *Williams v. City of Detroit*,[162] the court, abrogating governmental immunity, noted that the provision empowering the legislature to alter the common law *might* be read as depriving courts of all jurisdiction to alter the common law rule.[163]

Another route followed by courts is merely to ignore the provision. Ironically, although all courts overruling governmental immunity appear to recognize its common law origins, some of them do not refer to the common law provisions in their own constitutions or statutes.[164] Those courts hold that the alteration of the immunity rule is not solely a matter for the legislature, since the courts may change a common law rule originally judicially recog-

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157. *See* note 34 and accompanying text *supra*.

158. 100 Eng. Rep. 359 (K.B. 1788). *See* notes 33-51 and accompanying text *supra*.

159. *Contra*, Maffei v. Inc. Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959); *see* Notes 35-39 and accompanying text *supra*.

160. The Florida Supreme Court, in its abrogative decision of governmental immunity, made this point clear:

> Assuming that the [governmental] immunity rule had its inception in The Men of Devon case, and most legal historians agree that it did, it should be noted that this case was decided in 1788, some twelve years after the Declaration of Independence.

Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957). Consequently, the court held itself not impeded by FLA. STAT. ANN. § 2.01 (1961) which adopted the common law in the state.

161. *E.g.*, ARIZ. REV. STAT. ANN. § 1-201 (1956); CALIF. CIVIL CODE § 22.2 (West 1954); MICH. CONST. art. 7, § 7; N.J. CONST., sched., § 1(31).

162. 354 Mich. 231, 111 N.W.2d 1 (1962).

163. *Id.* at 256, 111 N.W.2d at 23, referring to MICH. CONST. sched., § 1 (1908) (same MICH. CONST. art. 7, § 7 (1963)):

> The common law and statute laws now in force, not repugnant to the constitution, shall remain in force until they expire by their own limitations or are changed, amended or repealed.

164. *E.g.*, Moliter v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Holytz v. City of Detroit, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

nized when it becomes unjust, archaic, or outdated.[165] Such an approach to constitutional or statutory provisions adopting the pre-Declaration of Independence common law apparently rests on the concept that the common law, because of its nature, has always been, and must ever remain, responsive to the present needs of society. However, taking this view of the common law seemingly negates constitutional and statutory provisions empowering the legislature alone to alter it.

In regard to sovereign immunity, such provisions constitute little, if any, impediment to the abrogating court. The theory that "the King can do no wrong" can be effectively argued as not part of the common law intended to be adopted by a state founded upon democratic principles.[166] However, as the next section demonstrates, courts that have abrogated, or attempted to abrogate, sovereign immunity, face a much more difficult hurdle in constitutional provisions which have been interpreted to mandate sovereign immunity.

C. *State Constitutional Mandate of Immunity*

The third, and perhaps the most difficult, obstacle to courts considering abrogation, especially of sovereign immunity, is the argument that the immunity is constitutionally mandated. The source of this contention is typically the presence of a state constitutional provision which states that the "[l]egislature shall direct by law in what manner and in what courts suits may be brought against the State."[167] Such provisions are usually interpreted to

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165. Perhaps a justification for this view may be found in a statement by the Wisconsin Supreme Court:

> [W]e cannot adopt the view that the . . . Constitution [of Wisconsin] prohibits this court from now adopting common law principles or of changing them. Inherent in the common law is a dynamic principle which allows it to grow and tailor itself to meet changing needs within the doctrine of *stare decisis*, which if correctly understood was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose. If this were not so, we must succumb to the rule that a judge should let others "long dead and unaware of the problems of the age in which he lives, do his thinking for him."

Bielski v. Schulze, 16 Wis. 2d 1, 11, 114 N.W.2d 105, 110 (1962). This case was cited, but not discussed, in Holytz v. City of Milwaukee, 17 Wis. 2d 26, 35, 115 N.W.2d 618, 624 (1962), for the proposition that the court was entitled to change the common law regardless of WIS. CONST. art. 14, § 13. *See* note 154 *supra* for text of this provision.

166. *See* note 107 and accompanying text *supra*.

167. *E.g.*, ARIZ. CONST. art. 4, § 18; CALIF. CONST. art. XX, § 6; DEL. CONST. art. I, § 9; IND. CONST. art. 4, § 24; NEB. CONST. art. V, § 22; OHIO CONST. art. I, § 16; PA. CONST. art. I, § 11; WIS. CONST. art. IV, § 27.

mean that the "state may not be sued without consent by the legislature."[168] Hence the judicial machinery is deemed impotent in handling the immunity problem. A petition for legislative action is considered the only remedy.[169]

As previously discussed,[170] *Russell v. The Men of Devon*,[171] generally cited as the common law origin of governmental immunity, may have been misinterpreted by the courts and may merely stand for the proposition that suits against the county were not to be permitted in the absence of prior statutory authority. Apparently, *Russell* has been adopted in this country for precisely that proposition in *Mower v. Leicester*.[172] Similarly, the rise of sovereign immunity, although originating with the king himself, and hence of different origin than its governmental counterpart, arrived in the United States supported by the same judicial reasoning—no suit without legislative consent.[173] Consequently, it is submitted that court interpretations of constitutional provisions enabling the legislature to specify the manner and the courts in which suits may be brought against the state, are reiterations of ancient common law thinking.

This premise, however, would not survive the Supreme Courts of California, Indiana, and a lower court in Ohio. Those courts have interpreted their respective state constitutional provisions, not as reiterating the common law immunity, but as possibly waiving it.

Early in 1961, by a pair of companion decisions, the California Supreme Court cast both the doctrines of governmental and sovereign immunity into discard as mistaken and unjust. In the principal case, *Muscopf v. Corning Hospital District*,[174] the court, recognizing the doctrines of immunity as originally court-made,[175] swept away all vestiges of immunity in words which made it clear that no level of government in the state could rely upon the "governmental" nature of its function as a defense to tort liability.[176] In so doing, the court circumvented an argument based upon Article

168. *E.g.*, Shellhorn & Hill, Inc. v. State, 55 Del. 298, 187 A.2d 71 (1962); Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972).
169. *See* note 199 and accompanying text *infra*.
170. *See* notes 40-56 and accompanying text *supra*.
171. 100 Eng. Rep. 359 (K.B. 1788).
172. 9 Mass. 247 (1812). *See* notes 52-56 and accompanying text *supra*.
173. *See* notes 102-117 and accompanying text *supra*.
174. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).
175. *Id.* at 217, 359 P.2d at 461, 11 Cal. Rptr. at 93.
176. *Id.* at 213, 359 P.2d at 458, 11 Cal. Rptr. at 90. The companion decision, Lipman v. Brisbane Elem. School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961), however, softened the impact of the new rule somewhat by refusing to sustain liability in tort of a public entity whose culpable employee was immune from personal liability because of the discretionary nature of his duties. Official immunity, the court pointed out, was based upon a policy of preventing the threat of tort litigation, with potential liability, from serving as a deterrent to vigorous and forthright fulfillment of public duty. *Id.* at 229, 359 P.2d at 467, 11 Cal. Rptr. at 99.

XX, Section 6 of the California Constitution which provides: "Suits may be brought against the State in such manner and in such courts as shall be directed by law." It was urged upon the court that this provision be interpreted as having substantive significance and thus establishing a rule of sovereign immunity.[177] The court rejected the argument saying:

> If the section has any substantive significance it would appear to be a waiver of immunity. On its face it seems to say that the state may be held liable when suits are brought against it in accordance with a legislatively prescribed procedure. Consistent with our previous construction of essentially identical statutory language, however, we hold that Article XX, Section 6 provides merely for a legislative consent to suit.[178]

In essence, the court rejected the constitutional provision as establishing substantive sovereign immunity. Rather, the provision was viewed merely as an enabling provision whereby the legislature could consent to suit.

Moreover, the court was not of the opinion that the provision, by authorizing legislative consent to suit, vested exclusive jurisdiction regarding immunity abrogation in the legislature. Indeed, the court felt free to adhere to its own rules of immunity in areas where the legislature had not acted.[179]

In this latter aspect, however, the Wisconsin Supreme Court has held otherwise. In 1962, the court abrogated sovereign and governmental immunity in *Holytz v. City of Milwaukee*.[180] Satisfied that the immunity doctrines were of judicial origin and noting the failure of the legislature to adopt corrective measures,[181] the court removed the defense of nonliability but retained the right of the state to be sued only upon its consent.[182] Consequently, the Wisconsin court, like that of California, refused to consider the constitutional provision as giving rise to substantive immunity. Unlike its counterpart in California, however, it deemed itself precluded from entertaining suits against the state in the absence of legislative consent. It is submitted that the Wisconsin court, in effect, only nominally abrogated the immunity while retaining it under a procedural shield to liability.[183]

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177. *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.
178. *Id.* at 217, 359 P.2d at 460-61, 11 Cal. Rptr. at 92-93.
179. *Id.* at 218, 359 P.2d at 461, 11 Cal. Rptr. at 93.
180. 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
181. *Id.* at 33, 115 N.W.2d at 623.
182. *Id.* at 38-39, 115 N.W.2d at 625-26 (emphasis by court).
183. However, the decision in *Holytz* did create interpretive ambiguities for the Wisconsin courts regarding the existing statutory authorizations

In 1969, the Indiana Supreme Court, in its unanimous decision, *Perkins v. State*,[184] concluded that the State of Indiana was not immune from liability in the exercise of proprietary functions. In reaching its decision, the court was presented with an argument that suits could not be brought against the state unless permitted by statute.[185] That contention was based upon Article 4, Section 24 of the Indiana Constitution.[186]

The court interpreted this provision as not containing a plain, unequivocal statement that the State of Indiana shall be immune from suits imposing liability for damages, but only giving rise to an inference of such.[187] Furthermore, the court stated:

> As we read this section it occurs to us that the framers of the [Indiana] Constitution assumed that at common law the State was immune from suit and authorized the legislature to modify such liability to the extent it may see fit, providing that no private acts or special acts were passed for the benefit of some individual. We are not dealing here with a constitutional prohibition, but rather with a principle of common law of England which held "the King can do no wrong" and hence could not be sued in any court of law.[188]

By viewing the immunity as a principle of common law, and not as a constitutional mandate, the court expressed no hesitancy in assuming jurisdiction in the decision.[189] Consequently, the Indiana Supreme Court, like that of California, refused to recognize that a constitutional provision either mandated substantive sovereign immunity, or invested the legislature with the solitary power to abrogate the doctrine. In 1972, the court extended the philsophy of *Perkins* to "governmental" functions of the state, and

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of liability. These prior laws were suddenly transformed into apparent limitations upon the common law liability, due to the elimination by *Holytz* of the basic premise of governmental and sovereign immunity upon which the previous statutory structure had been erected. Consequently, the Wisconsin Supreme Court retreated from earlier and stricter view of such statutes as to their meaning and application. Van Alystyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 946 (1966).

184. 252 Ind. 549, 251 N.E.2d 30 (1969).

185. *Id.* at 552, 251 N.E.2d at 31-32.

186. Article 4, Section 24 of the Indiana Constitution states:

> Provision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution; but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State shall ever be passed.

187. Perkins v. State, 252 Ind. 549, 552, 251 N.E.2d 30, 31-32 (1969).

188. *Id.* at 552-53, 251 N.E.2d at 32.

189. The argument that the legislature—not the Court—is the one to make the change, is answered by the fact that the principle was created by the courts as part of the common law, and if error exists or if the principle has become antiquated, it is the duty of the Court to change it.

Id. at 555, 251 N.E.2d at 34 analogizing to prior abrogating decisions of charitable immunity: Harris v. Y.W.C.A., 250 Ind. 491, 237 N.E.2d 242 (1968); Ball Mem. Hosp. v. Freeman, 247 Ind. 71, 196 N.E.2d 274 (1964).

hence imposed total tort responsibility upon the state regardless of the nature of the offending activity.[190]

In 1971 it appeared the philosophy of the California and Indiana courts had gained a foothold in Ohio. The Ohio Court of Appeals, in *Krause v. State*,[191] rule the State of Ohio responsible under the doctrine of *respondeat superior* for tortious acts of its authorized agents. The state argued that it did not consent to be sued for the alleged negligence of its agents and employees and therefore the doctrine of sovereign immunity insulated it and its agents from response to the law.[192] Article I, Section 16 of the Ohio Constitution, cited as support for this argument, provides, *inter alia*: "Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

Nevertheless, after considering the history of the constitutional language, the court followed the reasoning in *Muscopf v. Corning Hospital District*[193] and reversed fifty-three years of prior holdings that the provision was not self-executing and thus required legislative authority by statute as a prerequisite to suit.[194] Quoting liberally with approval from *Muscopf*, the court considered the rule of sovereign immunity to be originally court-made.[195] Moreover, it followed the interpretation of the California court that the constitutional provision did not preclude judicial abrogation of the immunity. The enactment was viewed as authorizing the legislature to waive the immunity in areas that body may select, while permitting the courts to adhere to its own rules of immunity in other areas.[196]

Notwithstanding, less than a year later, the Ohio Supreme Court reversed this interpretation by the appellate court.[197] The court agreed with the appellate court that sovereign immunity was originally judicially created.[198] However, it concluded that it was not subject to judicial reexamination, citing the need for constitutional amendment to modify the present constitutional protection afforded the state.[199] In effect, the Ohio Supreme Court

190. Campbell v. State, Ind. , 284 N.E.2d 733 (1972).
191. 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971).
192. *Id.* at 3, 274 N.E.2d at 322-23.
193. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). *See* notes 174-79 and accompanying text *supra*.
194. Krause v. State, 28 Ohio App. 2d 1, 4, 274 N.E.2d 321, 323 (1971).
195. *Id.*
196. *Id.*
197. Krause v. State, 31 Ohio St. 2d 132, 142-43, 285 N.E.2d 733, 743-45 (1969).
198. *Id.* at 143, 285 N.E.2d at 745.
199. *Id.*

assumes a posture similar to that taken by its counterpart in Wisconsin[200]—a nominal interment of the sovereign immunity doctrine by its reclassification under a procedural concept.

In 1973, reasons of fairness, necessity and the encouragement of greater governmental responsibility motivated the Louisiana Supreme Court to adopt a stance opposite that of the Ohio court. In *Board of Commissioners v. Splendour Shipping & Enterprises, Inc.*,[201] all boards and agencies of the State of Louisiana were held liable in tort. This conclusion was reached in spite of an argument that the court was forbidden to waive the immunity of the state, or of its agencies, by Article 3, Section 35 of the Louisiana Constitution, which was amended in 1960 to allow the legislature to waive immunity either totally or for specific governmental entities.[202]

Apparently, the court viewed the provision as neither creating a substantive doctrine of sovereign immunity, nor as precluding court discretion in abrogating the concept. Indeed, the court found that "[t]he doctrine of sovereign immunity in Louisiana did not have its origin in . . . State Constitutions, but in jurisprudence."[203] Moreover, the significance of the constitutional provision was interpreted as a

> . . . [c]lear indication of the legislative policy [to require boards and agencies of the state to act responsibly or be subject to suit]. If any legislative authorization has been given for suit against any public body, it constitutes an effective waiver of immunity and liability. It is now and has been since 1864 the policy of this State that "every person for injury done him . . . shall have adequate remedy by due process of law and justice administered *without denial, partiality or unreasonable delay.*"[204]

This view of the Louisiana Supreme Court regarding Article 3, Section 35 of the Louisiana Constitution represents an extreme position among courts faced with similar provisions. Not only is the enactment viewed as a failing to hinder judicial abrogation; it is regarded as an effective legislative ally to courts in providing

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200. *See* notes 180-183 and accompanying text *supra*.

201. La. , 273 So. 2d 19 (1973).

202. As amended in 1960, Article 3, Section 35 of the Louisiana Constitution provides:

> The Legislature is empowered to waive, by special or general laws or resolution, the immunity from suit or from liability of the state. and of parishes, municipalities, political subdivisions, public boards, institutions, departments, commissions, districts, corporations, agencies, and authorities of other public or governmental bodies; and each authorization by the Legislature for suits against the State or other such public body, heretofore and hereafter enacted or granted shall be construed to be and shall be effective and valid for all purposes, as of and from the date thereof as a waiver of the defendant's immunity both from suit and from liability.

203. Board of Comm'rs v. Splendour Shipping & Enterprises, Inc., La. , 273 So. 2d 19, 23 (1973).

204. *Id.* at , 273 So. 2d at 26 (emphasis added), citing LA. CONST. art. I, § 6; art. 110 (1864); art. 10 (1868); art. II (1879); art. 6 (1898); art. 6 (1913).

redress for injuries heretofore blocked by the doctrine of sovereign immunity.

In summary, the obstacle presented to judicial abrogation of sovereign immunity by constitutional provisions, which authorize the manner and courts in which the state may be sued, is indeed formidable. Nevertheless, the California, Indiana, and Louisiana experiences indicate that it is surmountable. The courts of those states recognize that the sovereign immunity concept is one of judicial origin, and remains subject to court alterations regardless of subsequent constitutional enactments. The ultimate effect of these provisions is not to vest exclusive jurisdiction over the immunity in the legislature; but to authorize that body to abrogate the concept in areas it deems best, and permit the courts to adhere to its own rules of immunity in other areas.[205]

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205. This discussion has dealt exclusively with direct attempts to meet the "no-suit-without-consent" argument. It should be noted, however, that courts, unwilling or unable, to meet the issue head-on, may resort to an indirect approach by implying consent from the presence of liability insurance.

Heretofore, this approach has not been very successful. Especially in the absence of statutory authority to do so, it has been commonly held that the purchase of liability insurance by governmental units is ultra vires and hence has no effect on the immunity from tort of such unit. *E.g.*, Hartford Acc. & Indem. Co. v. Wainscott, 41 Ariz. 439, 19 P.2d 328 (1933); Burns v. American Casualty Co., 127 Cal. App. 2d 198, 273 P.2d 605 (1954); Adkins v. West. & So. Indem. Co., 117 W. Va. 451, 186 S.E. 302 (1936). Even if the purchase is authorized, the large majority of decisions has held that mere authorization is not a waiver of tort immunity. *E.g.*, Hammer v. School Dist., 124 Ind. App. 30, 112 N.E.2d 891 (1953); Maffei v. Incorp. Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959).

However, in line with the current trend toward increased governmental responsibility, more recent decisions have held that the authorized purchase of insurance carries with it a waiver of immunity to the extent of insurance coverage. The following is a list of jurisdictions which have adopted this position regarding governmental immunity: Davis v. City of Macon, 122 Ga. App. 665, 178 S.E.2d 557 (1970); Parker v. City of Hutchinson, 196 Kan. 148, 410 P.2d 347 (1966); Bale v. Ryder, Me. , 286 A.2d 344 (1972); Durr v. Alfred Jacobshagen Co., 243 Miss. 730, 139 So. 2d 852 (1962); Tucker v. City of Okolona, Miss. , 227 So. 2d 475 (1969); Fette v. City of St. Louis, 366 S.W.2d 446 (Mo. 1963); Gossler v. City of Manchester, 107 N.H. 310, 221 A.2d 242 (1966); Clark v. Ruidoso-Hondo Valley Hosp. Dist., 72 N.M. 9, 380 P.2d 168 (1963); Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971); Shermoen v. Lindsay, 163 N.W.2d 738 (N.D. 1968); Ballew v. City of Chattanooga, 205 Tenn. 289, 326 S.W.2d 466 (1959).

Similar results regarding sovereign immunity obtained in the following states: Nelson v. Maine Turnpike Auth., 157 Me. 174, 170 A.2d 687 (1961); Shermoen v. Lindsay, 163 N.W.2d 738 (N.D. 1968); State v. Peter Salvucci & Sons, Inc., 281 A.2d 164 (N.H. 1971); Clark v. Ruidoso-Hondo Valley Hosp., 7 N.M. 9, 380 P.2d 168 (1963); Newman v. State *ex rel.* Bd. of Regents, 490 P.2d 1079 (Okla. 1971).

Pennsylvania, prior to the abrogation of governmental immunity by

D. *Obstacles to Judicial Abrogation in Pennsylvania*

Obstacles to the Pennsylvania Supreme Court in its attempts to abrogate the immunity doctrines fall into two categories:[206] the argument to defer to general legislative policy,[207] and the argument that immunity is constitutionally mandated.[208]

The first obstacle was easily overcome by the court in its abrogative decision of governmental immunity in *Ayala v. Philadelphia Board of Public Education*.[209] In its brief, counsel for the Board of Education argued that the legislature was the proper forum for any changes because of its ability to create a comprehensive solution.[210] Not impressed with this argument, the court countered with its earlier rationale in limiting charitable[211] and intra-family[212] immunities: "We closed our courtroom doors without legislative help, and we can likewise open them."[213] Although the court acknowledged its prior suggestions to the legislature to undertake the abrogation of governmental immunity, it nonetheless felt that "these suggestions do not preclude our Court from now abolishing this judicially created doctrine."[214]

However, the facility with which the court "opened" and

Ayala, still clung to the view that the presence of insurance did not waive the immunity. *E.g.*, Michael v. School Dist., 391 Pa. 209, 137 A.2d 456 (1958). Similarly, with regard to the still-upheld doctrine of sovereign immunity, the Pennsylvania Supreme Court will not imply consent from available insurance coverage. *See* Brown v. Commonwealth, 453 Pa. 566, 570, 305 A.2d 868, 870 (1973). Hence it may be a reasonable conclusion that the only method to judicially circumvent sovereign immunity is by the more direct attack of abrogation. *See* notes 230-236 and accompanying text *infra*.

206. Apparently the court would not be concerned whether either immunity doctrine arose subsequent or prior to 1776. *See* notes 154-166 and accompanying text *supra*. Although PA. STAT. ANN. tit. 46, § 151 (1969) did revive provincial laws and adopt English common laws and statutes, it was repealed by the Act of Dec. 6, 1972, Pub. L. No. 290, § 4, which was immediately effective.

207. *See* notes 141-153 and accompanying text *supra*.

208. *See* notes 167-205 and accompanying text *supra*.

209. 453 Pa. 584, 305 A.2d 877 (1973).

210. Brief for Appellee at 2, Ayala v. Phila. Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973):

> The rationale for retention of the doctrine of immunity has been marked in recent years by a realization that the legislature is the proper body to make such a significant change as abolition. The legislature can more effectively deal with the administrative details of change because of its superior ability to create a comprehensive and flexible solution.
>
> Although few courts have taken the broad step of abolishing immunity, a greater number upon reexamination have concluded that the doctrine should be retained, or change undertaken by the legislature.

211. Flagiello v. Pa. Hosp., 417 Pa. 486, 208 A.2d 193 (1965).

212. Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971).

213. Ayala v. Phila. Bd. of Pub. Educ., 453 Pa. 584, 600, 305 A.2d 877, 885 (1973).

214. *Id.* at 602, 305 A.2d at 886, referring to Morris v. Mt. Lebanon School Dist., 393 Pa. 633, 634, 144 A.2d 737, 738 (1958) and Dillon v. York City School Dist., 422 Pa. 103, 107, 220 A.2d 896, 898 (1966).

"closed" the door to governmental immunity is not present when considering the abrogation of sovereign immunity. The impediment is Article 1, Section 11 of the Pennsylvania Constitution which has been interpreted to mandate sovereign immunity and vest exclusive jurisdiction in the legislature to alter the concept. As a result, the Pennsylvania Supreme Court has deemed itself impotent to consider abrogation.[215]

Nevertheless, three factors seem to militate against a conclusion that this attitude of the court will long endure. The first is that in its two most recent decisions upholding the doctrine of sovereign immunity, the court has been by no means unanimous. *Biello v. Pennsylvania Liquor Control Board*[216] was decided over the strong dissenting opinion of Justice Nix in which Justice Roberts joined. Subsequently, *Brown v. Commonwealth*[217] was decided over three dissenting opinions of Justices Roberts, Nix, and Manderino. Consequently, strong abrogative opinions will be raised to continually test the vitality of the sovereign immunity doctrine in future cases dealing with the issue.

The second factor which casts doubt on the future of sovereign immunity in Pennsylvania is the attitude taken by the majority in *Biello* and *Brown*. Apparently empathizing with the plaintiff but expressing helplessness in the situation, the court acknowledged that if the issue were one of first impression, they would not have established immunity.[218] Accordingly, the court pleaded for legislative action: "We reiterate our urging of the need for comprehensive action permissible under Article I, Section 11."[219] The court recognized that previous pleadings for legislative activity have been futile.

> In the past, appeals to our Legislature to follow [the legislative solutions adopted by other states] has invariably fallen upon deaf ears . . . . We can only hope they will now see the wisdom of such action.[220]

It is apparent that the recent majority opinions sustaining sovereign immunity in Pennsylvania stand on reluctant grounds.

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215. *See* notes 132-138 and accompanying text *supra*.
216. Pa. , 301 A.2d 849 (1973).
217. 453 Pa. 566, 305 A.2d 868 (1973).
218. Biello v. Pennsylvania Liquor Control Bd., Pa. , 301 A.2d 849, 852 (1973).
219. Brown v. Commonwealth, 453 Pa. 566, 571 n.6, 305 A.2d 868, 870 n.6 (1973), citing Stouffer v. Morrison, 400 Pa. 497, 502-03, 162 A.2d 378, 381 (1960).
220. Biello v. Pennsylvania Liquor Control Bd., Pa. , 301 A.2d 849, 852-53 n.3 (1973).

The third, and perhaps most decisive, factor in doubting the continued longevity of sovereign immunity in the commonwealth, is the application of the "governmental-proprietary" distinction to sovereign immunity cases.[221] Considering the reluctance of the court to continue the doctrine together with the ready framework established in other states,[222] it is submitted that, notwithstanding the interpretation of Article I, Section 11—no suit without legislative consent[223]—should the offending state activity be deemed "proprietary," liability will follow regardless of legislative authorization.[224] Moreover, the adoption of the "governmental-proprietary" distinction may subject sovereign immunity to the same inconsistent, piecemeal erosion that plagued governmental immunity prior to its abrogation.[225]

The foregoing three factors—a strong minority, a reluctant majority admonishing the legislature to action, and an explicit adoption of a distinction heretofore limited to governmental immunity—indicate that the doctrine of sovereign immunity in Pennsylvania stands on rather uncertain grounds. Should the legislature fail to heed the suggestions by the court to fashion comprehensive tort legislation,[226] it is submitted that the Pennsylvania Supreme

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221. In *Biello*, the court stated:

> While in Pennsylvania we have not before expressly employed the distinction between governmental and proprietary functions when considering the sovereign immunity doctrine, it has nonetheless been implicit in our application of the doctrine. In many of our decisions, where we have found the bar to exist, we have noted that the function being performed was a governmental one.
>
> In accepting the distinction between governmental and proprietary functions, we are appreciative of the difficulties experienced by our courts in using this distinction in the context of governmental immunity cases. . . .

Id. at , 301 A.2d at 851-52. *But see* Pomeroy, J., concurring in *Brown* wherein it is stated that Article I, Section 11 applies regardless whether the function is characterized as "governmental" or "proprietary;" and that the "governmental" functions interpreted in *Biello* were not meant to be used in contradistinction to the idea of "proprietary." Brown v. Commonwealth, 453 Pa. 566, 574 n.1, 305 A.2d 868, 873 n.1 (1973).

222. *See* notes 57-59 and accompanying text *supra.*

223. *See* notes 131-138 and accompanying text *supra.*

224. *See* Brown v. Commonwealth, 453 Pa. 566, 577, 305 A.2d 868, 873 (1973) (Roberts, J., dissenting opinion).

225. *See* notes 80-85 and accompanying text *supra.*

226. As of the writing of this Comment, legislative responses have been somewhat less than comprehensive:

> H.B. 1183, 157th Sess. (1973):
>
> AN Act
>
> Authorizing, pursuant to the authority granted the Legislature by Section 11, Article I of the Constitution of the Commonwealth of Pennsylvania, suit against the Commonwealth of Pennsylvania as a party defendant and permitting the joinder of the Commonwealth as a party defendant in certain cases.
>
> S.B. 1125, 157th Sess. (1973):
>
> An Act
>
> Making the Commonwealth liable to suits in the same manner, courts and cases as individuals and other entities.
>
> S.B. 1126, 157th Sess. (1973):
>
> A Joint Resolution
>
> Proposing an amendment to the Constitution of the Commonwealth

Court may be receptive to arguments advocating the judicial abrogation of sovereign immunity.

Apparently, an argument, which may be adopted by the court in any future opinion abolishing sovereign immunity, may be one adopting the reasoning in *Ayala v. Philadelphia Board of Public Education*[227]—the doctrine was court-originated and can be court-abrogated. Although *Ayala* dealt with governmental immunity, its extension to the issue of sovereign immunity may be logical. As already discussed,[228] governmental and sovereign immunities may have had separate origins, but both concepts may be supported by a similar judicial philosophy—no suit without prior legislative consent.[229] However, before *Ayala* can be adopted to sovereign immunity, there remains the problem of Article I, Section 11 of the Pennsylvania Constitution.

As the Supreme Courts of California, Indiana, and Louisiana have done,[230] the Pennsylvania court must first hurdle the argument that Article I, Section 11 constitutionally mandates sovereign immunity. It should be emphasized that the doctrine of sovereign immunity as based upon Article I, Section 11 arose from court *interpretation* of that enactment and not from the explicit wording of the provision.[231] Indeed, on examining Article I, Section 11 in

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of Pennsylvania, Article I, Section 11 removing the sovereign immunity of the Commonwealth to suit and making it liable in the same manner, courts, and cases as are individuals and other entities.

S.B. 1128, 157th Sess. (1973). *See* note 101 *supra* for full text.

227. 453 Pa. 877, 305 A.2d 877 (1973). *See* notes 209-214 and accompanying text *supra*.

228. *See generally* notes 33-39 and accompanying text *supra*.

229. *See* notes 40-43, 52-59, 102-117 and accompanying text *supra*.

230. *See* notes 174-179, 184-190 and 200-203 and accompanying text *supra*.

231. *See* notes 131-138 and accompanying text *supra*. In the dissenting words of Justice Manderino in *Brown*:

> [The doctrine of sovereign immunity] is a doctrine which has no support in the *written constitution of Pennsylvania*—and never had.
>
> The majority concludes that past decisions of this Court have settled the question. They have not. Each of the past decisions of this Court have *pronounced* the existence of sovereign immunity and then cited a previous case in support of the *pronouncement*. One would expect that a search through the precedents, containing the *pronouncement* followed by a prior citation, would eventually lead to the origin of the judicial chain and a discovery that the chain is solidly anchored in principles worthy of government established by a *written constitution*. Such a discovery cannot be found in prior decisions of this Court. Those decisions have assumed that the *sovereign is the state* and that the state possesses inherent and inalienable rights—the exact principles of government guillotined and buried in the human revolutions that gave birth to *written constitutions*.

its entirety, it may be unreasonable to conclude that a mandate of sovereign immunity lies within its provisions.[232]

Justice Nix refutes the contention that sovereign immunity is mandated by Article I, Section 11. In his dissent in *Biello*, he interprets the provision as merely setting forth:

> . . . [T]he mechanism by which the State may waive [its power to consent to suit] . . . . The Constitution is therefore neutral—it neither requires nor prohibits sovereign immunity. The framers of the Constitution accepted the then prevalent concept of sovereignty to include immunity from suit, and attempted through this section to implement the power of the State to consent to actions brought against it.[233]

Thus far, the foregoing arguments have suggested that Article 1, Section 11 of the Pennsylvania Constitution does not mandate sovereign immunity. Rather, it merely provides a procedural device whereby the legislature may implement substantive constitutional rights and consent to suits brought against the state. What remains to be considered is whether Article I, Section 11, although neutral as to immunity, vests exclusive jurisdiction in the legislature to abolish the principle. The Supreme Courts of Wisconsin and Ohio have held in the affirmative;[234] those of California, Indiana, and Louisiana have answered otherwise.[235] Perhaps, Justice Nix, dissenting in *Biello*, may provide the key to a possible Pennsylvania response:

> [Article I, Section 11] of the Constitution was also directed to resolving the issue of whether there was, in fact, the power to consent to suit and if the power was found to exist, which branch of the government had the power to exercise that judgment. The majority mistakenly concludes that since the framers recognized the need for resolution of these issues, they thereby mandated the doctrine itself. In my judgment it is an unwarranted conclusion to assume from the grant of power of consent to the legislative branch that this was implicitly an abrogation of the court's traditional powers to abolish common law principles when they no longer meet the needs of time.[236]

According to this view, Pennsylvania would consequently fall in line behind California, Indiana, and Ohio.

Hence it is submitted that valid arguments can be made on be-

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Brown v. Commonwealth, 453 Pa. 566, 580, 305 A.2d 868, 875 (1973) (emphasis by the court).

232. Brown v. Commonwealth, 453 Pa. 566, 580, 305 A.2d 868, 875 (1973) (Manderino, J., dissent).

233. Biello v. Pennsylvania Liquor Control Bd., Pa. , 301 A.2d 849, 854 (1973). *Accord*, Brown v. Commonwealth, 453 Pa. 566, 577, 305 A.2d 868, 871 (1973) (Roberts, J., dissent).

234. *See* notes 182-83, 198-99 and accompanying text *supra*.

235. *See* notes 179, 189, 203 and accompanying text *supra*.

236. Biello v. Pennsylvania Liquor Control Bd., Pa. , 301 A.2d 849, 854 (1973).

half of judicial abrogation of sovereign immunity in Pennsylvania. It is further submitted that should the General Assembly of Pennsylvania fail to heed the recent pleas in *Biello* and *Brown* for comprehensive tort legislation, the Pennsylvania Supreme Court may abandon its present stance regarding sovereign immunity. In so doing, the court may very well adopt an argument similar to the foregoing to bury the immunity theory next to its still-warm governmental counterpart.

VI. Conclusion

In view of the modern belief that society, not the individual should bear the burden of costs occasioned by the torts of the state and local governmental units, the rules of governmental and sovereign immunity are unjust and archaic. Although the courts may not invalidate a statute merely because it violates their sense of justice, they can admittedly modify a common law rule when it becomes unjust. State legislatures, which alone can effectively solve the problem of governmental responsibility, have neglected their obligation to act. However, they have been forced to face the problem by courts abrogating the immunity doctrines. In this respect the principal contribution of the judicial abrogation movement is its influence on legislative consideration of the problem. Such consideration is necessary—legislative help is needed to fix the responsibility of various governmental units with due regard for the position they occupy within the total governmental structure.

Via *Ayala,* Pennsylvania has experienced this trend toward collective responsibility for damages arising in the exercise of public activities. The ultimate effect of its judicial abrogation of governmental immunity in promoting legislative action is yet to be seen. However, should the General Assembly continue to ignore the judicial pleas for comprehensive tort legislation, the Pennsylvania Supreme Court may provide stronger incentive by abolishing the doctrine of sovereign immunity.

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